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REPORT OF THE WORKING GROUP ON INTERNATIONAL CONTRACT PRACTICES ON THE WORK OF ITS TWENTY-SECOND SESSION
(Vienna, 19 - 30 September 1994)

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I. INTRODUCTION

1. Pursuant to a decision taken by the Commission at its twenty-first session, 1/ the Working Group on International Contract Practices devoted its twelfth session to a review of the draft Uniform Rules on Guarantees being prepared by the International Chamber of Commerce and to an examination of the desirability and feasibility of any future work relating to greater uniformity at the statutory law level in respect of guarantees and stand-by letters of credit. The Working Group recommended that work be initiated on the preparation of a uniform law, whether in the form of a model law or in the form of a convention.

2. That recommendation was accepted by the Commission at its twenty-second session. 2/ The Working Group devoted its thirteenth to twenty-first sessions to the preparation of a uniform law (the reports of those sessions are found in documents A/CN.9/330, 342, 345, 358, 361, 372, 374, 388 and 391). That work has been carried out on the basis of background working papers prepared by the Secretariat on possible issues to be included in the uniform law. Those background papers included: A/CN.9/WG.II/WP.63 (tentative considerations on the preparation of a uniform law); WP. 65 (substantive scope of application, party autonomy and its limits, rules of interpretation); WP.68 (amendment, transfer, expiry and obligations of the guarantor); WP.70 and WP.71 (fraud and other objections to payment, injunctions and other court measures, conflict of laws and jurisdiction). The draft articles of the uniform law, which the Working Group decided should as a working assumption be in the form of a draft Convention, were presented by the Secretariat in A/CN.9/WG.II/WP.67, WP.73 and its Add.1, WP.76 and its Add.1, WP.80, and WP.83. The Working Group also had presented to it, in A/CN.9/WG.II/WP.77, a proposal by the United States of America relating to rules for stand-by letters of credit. At its previous session, the twenty-first, the Working Group noted that the current reading begun by the Working Group (A/CN.9/WG.II/WP.80 and WP.83) would be the final reading of the draft articles prior to submission of the text to the Commission at its twenty-eighth session (1995), as requested by the Commission. 3/

3. The Working Group, which was composed of all States members of the Commission, held its twenty-second session in Vienna, from 19 to 30 September 1994. The session was attended by representatives of the following States members of the Working Group: Argentina, Austria, Chile, Canada, China, Costa Rica, Ecuador, Egypt, France, Germany, Hungary, India, Iran (Islamic Republic of), Japan, Morocco, Nigeria, Poland, Russian Federation, Saudi Arabia, Spain, Sudan, Thailand, Togo, United Kingdom of Great Britain and Northern Ireland and United States of America.

4. The session was attended by observers from the following States: Algeria, Bosnia and Herzegovina, Brazil, Colombia, Croatia, Czech Republic, Indonesia, Kuwait, Romania, Sweden, Switzerland, Turkey, Ukraine, Venezuela, and Yemen.

5. The session was attended by observers from the following international organizations: United Nations Industrial Development Organization (UNIDO), the Hague Conference on Private International Law, Fédération Bancaire de la Communauté Européenne and Federación Latinoamericana de Bancos (FELABAN).

6. The Working Group elected the following officers:

Chairman: Mr. J. Gauthier (Canada)

Rapporteur: Mr. M. Koteswara Rao (India).

7. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.II/WP.82) and a note by the Secretariat containing articles 1 to 27 of the draft Convention (A/CN.9/WG.II/WP.83).

8. The Working Group adopted the following agenda:

1. Election of officers.

2. Adoption of the agenda.

3. Preparation of a draft Convention on independent guarantees and stand-by letters of credit.

4. Other business.

5. Adoption of the report.

II. DELIBERATIONS AND DECISIONS

9. The Working Group discussed draft articles 17 to 27 and draft articles 1 to 7(1) as set forth in A/CN.9/WG.II/WP.83. The deliberations and conclusions of the Working Group relating to draft articles 17 to 27, and 1 to 7(1), of the draft Convention are set forth below in chapter II.

10. Following its approval of the substance of those articles, the Working Group referred the draft articles of the Convention that it had considered to a drafting group that included delegates from China, France, Russian Federation, Spain and the United Kingdom and was established by the Secretariat to assist it in implementing the decisions of the Working Group and ensuring consistency among the six official language versions. The Working Group reviewed the articles after the review by the drafting group and approved the text of those articles as set forth in the annex.

* * *

III. CONSIDERATION OF ARTICLES OF DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT

CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES

Article 17. Payment or rejection of demand

(continued)

Paragraph (2)

11. The Working Group resumed its consideration of paragraph (2), which had been commenced at the twenty-first session, on the basis of a draft reflecting the two alternative texts that the Secretariat had been requested to present. One alternative required the guarantor/issuer to refuse payment when shown facts making the demand manifestly and clearly improper, while the other provided in such cases a discretionary right to make payment, provided that such payment would be consistent with the good faith obligation in article 13. In the face of differing views as to which alternative would be appropriate, the view was expressed that paragraph (2) could be deleted. However, the Working Group took the view that the retention of paragraph (2) was necessary and turned to a discussion of which approach to retain and how it should be formulated.

12. While there was unanimous accord that, at least in theory, the guarantor/issuer would and should refuse payment in the face of manifest and clear evidence of impropriety, as a practical matter, interest was expressed in a discretionary ("may pay/may refuse payment") approach so as to give the guarantor/issuer a degree of leeway in cases in which the evidence might still leave a degree of doubt in the guarantor/issuer's mind as to whether there was in fact impropriety. Attention was drawn to the prevalence of disputes and allegations of improper demands for payment in the context surrounding demands for payment of undertakings of the type in question. It was stressed that a discretionary approach in such cases would provide a defense for the guarantor/issuer that decided, because of doubt, to pay, while a mandatory ("shall not pay") approach would tend to push guarantor/issuers to refuse payment in such cases. This, it was said, would stultify and make uncertain the very undertakings that the draft Convention was intended to support.

13. The view was also expressed that a mandatory approach would implicate to an undesirable degree the draft Convention in the guarantor/issuer's relationship with the principal/applicant, which it had been agreed would not be the focus of the draft Convention. Interest in a discretionary approach also resulted from a concern that a mandatory approach would raise difficulties because the formulations "shown facts" and "manifestly and clearly" would be unfamiliar in some jurisdictions and might raise the spectre of over-involving the guarantor/issuer in the underlying transaction.

14. Yet another concern was that an across-the-board mandatory approach would not take into account the possible need for exceptions to address situations such as confirmation and negotiation and perhaps other contexts of correspondent-banking relationships, in which the paying bank might not be privy to the allegations of impropriety and would then encounter difficulties in obtaining reimbursement. It was noted that this was a question that might apply as well to other provisions of the draft Convention and would be considered by the Working Group at a later point.

15. At the same time, reservations were expressed concerning the discretionary approach on the ground that it would dilute the certainty of the undertaking, and would thus impair the fundamental right of the beneficiary, which was to obtain payment of a conforming demand. It was further suggested that uncertainty inherent in the discretionary approach would raise difficulties for obtaining preliminary measures, in particular in jurisdictions in which the claimant had to show that it had a clear right that would be vindicated in the main proceedings. In response to those concerns, it was suggested that explicit reference might be made in paragraph (2) to article 21, which provided for provisional court measures. It was also pointed out that the risk of dilution of the certainty of the undertaking would be alleviated by the fact that a beneficiary whose demand for payment had been wrongfully refused could sue the guarantor/issuer for wrongful dishonour. Another suggestion in the same direction was to expand paragraph (1 bis) to cover these concerns about a discretionary approach.

16. In support of the mandatory approach, it was stressed that a duty for the guarantor/issuer not to pay was a logical consequence of the rules in article 19 on improper demand and that a rule that stated a duty not to pay formed a basis for the provisions in article 21 on provisional court measures. It was also stated that the guarantor/issuer in its relation to the principal/applicant sometimes had a duty not to pay, regardless of the provisions in the Convention, and that therefore a mandatory approach would in fact not create a greater uncertainty. Further, it was pointed out that the Working Group at its nineteenth session decided on a mandatory approach (A/CN.9/374, para. 113). After deliberation, the Working Group took the view that the mandatory approach was preferable. In order to meet the concern that the notion "manifestly and clearly" would be unfamiliar in some jurisdictions, the Working Group requested the Secretariat to prepare a formulation that would explicitly wed in paragraph (2) the notions of "manifestly and clearly" with the obligation of the guarantor to act in good faith pursuant to article 13. However, a note of caution was struck that pains should be taken to avoid suggesting that, by including a reference both to the notions of "manifestly and clearly" and "good faith", new hurdles for obtaining provisional measures were intended to be placed in jurisdictions where only one or the other concept was known.

Paragraph (3)

17. Views were exchanged as to whether to retain the words in brackets in paragraph (3), which restricted the instances in which the guarantor/issuer was required to give notice of rejection of a demand for payment to the beneficiary to the cases specified in paragraphs (1) and (2) of article 17. Retention of the words in the brackets was urged since the philosophy behind prompt notification was in particular to give the beneficiary a chance to correct discrepancies in the demand that were curable. The prevailing view, however, was that the words in brackets should be deleted. It was felt that the requirement to give notice should be broader, covering all grounds for rejection, not only those covered in article 17(1) and (2). It was noted that the deletion of the words in brackets would not necessarily render overly broad the provisions in paragraph 17(4) dealing with sanctions for failure to comply with provisions of article 16(2), since paragraph 17(4), in essentially all of its possible variants, referred to sanctions in relation to discrepancy in documents.

Paragraph (4)

18. Various views were exchanged as to whether or not the draft Convention should contain provisions as proposed in paragraph (4), which provided for sanctions against a guarantor/issuer who failed to examine a demand and any other accompanying documents as required by provisions of article 16(2) or failed to give notice to the beneficiary of the rejection of the demand as required by

article 17(3). In opposition to the inclusion of such a provision in the draft Convention, it was stated: that matters of sanctions, especially as they related to damages, should be left to domestic law rather than that law being replaced by the draft Convention; that the draft Convention did not provide for sanctions in other areas where there might be a failure of notification; and that the preclusion rule, as proposed in Variants A and B of paragraph (4), was too harsh on the guarantor/issuer and was not appropriate as a sanction, in particular since it might have consequences that were not apparent to the drafters of the Convention.

19. In support of including a provision on sanctions, at least to the extent of including a preclusion rule, it was stated that such a provision would add value and effectiveness to the draft Convention. It was further stated that the rule would introduce discipline, certainty and efficiency in banking practice, providing an incentive to the guarantor/issuer to give notice and examine the demand and accompanying documents. It was noted that, while a preclusion rule was not in place in the Uniform Rules for Demand Guarantees (URDG) with respect to guarantees, it was in place under the Uniform Customs and Practice for Documentary Credits (UCP) in relation to stand-by letters of credit, reflecting the fact that the preclusion rule had its origins in mercantile practice rather than in legal theory or doctrine. It was suggested that its inclusion in the draft Convention would promote uniformity between the two systems, and help to instill an added degree of discipline in guarantee practice in cases where examination of documents was relevant.

20. Differing views were expressed as regards the four variants contained in paragraph (4), with many of those views sharing a hesitation about attempts contained in the variants to set out a rule on damages. In support of Variant A, it was noted that it restricted itself to precluding a guarantor/issuer who failed to comply with provisions contained in article 16(2) and 17(3) from invoking any discrepancy in the documents not discovered or not notified to the beneficiary as required by those provisions, and that this was an area in which the bank was well placed to take action. Variant C was praised for containing the limitation on the preclusion rule to the effect that only reliance on discrepancies that would have been curable was prohibited. However, Variant C did not receive much support, since it was viewed as being too prescriptive and introducing uncertainty.

21. While some support was expressed for Variant D as stating a relatively clearer rule on damages, reservations were expressed as regards that variant on the grounds that it did not deal with preclusion, instead providing for liability for damages, but without clarifying whether the liability it created would be based on fault or strict liability. Objections were also raised to the portion of Variant B dealing with damages.

22. As regards which formulation of a preclusion rule would be preferable, the Working Group generally preferred the one contained in the first portion of Variant B. As regards the inclusion of the words "not discovered" in Variant B, it was explained that those words were intended to cover the situation where a guarantor/issuer had not examined the documents as required in article 16(1) and were designed to encourage the guarantor/issuer to examine the demand and any other accompanying documents. The Working Group decided, however, that those words could be deleted.

23. After deliberation, the Working Group decided to retain paragraph (4) provisionally, within square brackets, containing only the preclusion rule as set forth in the first portion of Variant B. This would allow further consideration of whether or not the preclusion rule should be retained in the draft Convention and, if retained, whether it should be mandatory.

24. Upon concluding its consideration of paragraph (4) the Working Group paused to consider a proposal to reinstate paragraph (1 ter), which prohibited the guarantor/issuer from refusing payment on the grounds of the financial difficulty or other inability of the principal/applicant, but which it had been decided at the twenty-first session (A/CN.9/391, para. 127) to delete. The Working Group affirmed that earlier decision.

Article 19. Improper demand

Title

25. The Working Group noted a view that the title of the article would be unfamiliar to practitioners who were accustomed in this context to the terms "fraud" and "abuse". It was decided, however, to affirm the continued use of the term "improper demand" in view of the aim of the draft Convention to cover in a single instrument both independent bank guarantees and stand-by letters of credit, and the attendant desirability of avoiding the use of terms, such as "fraud"and "abuse", that might be unfamiliar or have divergent meanings in various jurisdictions.

26. The Working Group also noted a view that article 19, and the draft Convention, did not deal explicitly with counter-guarantees. While it was generally recognized that, as indicated in subparagraph (a) of article 6 (definition of "undertaking"), counter-guarantees, themselves, defined in subparagraph (d) of article 6, were considered to be autonomous undertakings covered by the provisions of the draft Convention, there might be some merit in referring explicitly to counter-guarantees in article 19, or perhaps instead in articles 17 and 21, and perhaps at certain other points in the text. The Working Group agreed to review the matter further at a later stage in its deliberations.

Paragraph (1)

27. As had been the case at the twentieth session (see A/CN.9/388, para. 18), the concern was expressed that in some jurisdictions the term "forgery" used in subparagraph (a) traditionally had a technical meaning that might result in the characterization of a demand as improper even though the forgery concerned was insignificant and without fraudulent intent. It was suggested that the expression "fraudulently false or fraudulently completed" should be used instead. The Working Group felt, however, that the suggested replacement could not be accepted in view of the decision not to make use of the term "forgery". The Working Group also noted a concern that, in some jurisdictions, the term "fraud" might in fact be construed in a narrow fashion with the result that some cases intended to be covered by article 19 would in fact fall beyond its scope. Other alternatives proposed included referring to the lack of authenticity and false content of the document or to the essential or material nature of the misrepresentation. The Working Group decided that the existing formulation should be reviewed by the drafting group in view of the concern raised.

28. As regards subparagraphs (b) and (c), the Working Group noted a concern that the references in those provisions to "no payment being due on the basis asserted in the demand", to "judging" and to a demand having "no conceivable basis" were incompatible with simple-demand guarantees and other independent undertakings and would enmesh the guarantor/issuer in investigating the underlying transaction. However, it was pointed out that the purpose of article 19 was merely to define "improper demand", and that the subjective factors concerning the degree of knowledge of impropriety that needed to be in the possession of the guarantor/issuer or a court in order for

payment to be refused or for provisional measures to be issued were matters dealt with in article 17 and 21 respectively.

29. A drafting suggestion was made to the effect that the word "or" might be added at the end of subparagraph (a) in order to make it clear that the grounds referred to in paragraph (1) were alternative rather than cumulative elements of impropriety, a matter which was left to the consideration of the drafting group.

30. Subject to the consideration of the various drafting suggestions that had been made, the Working Group found the substance of paragraph (1) to be generally acceptable.

Paragraph (2)

31. The Working Group agreed to retain the reference that had been added at the end of subparagraph (b) to the possibility that an undertaking would be issued to cover the risk of a declaration of invalidity of the underlying transaction.

32. The concern was expressed that the formulation in subparagraph (c), which was said to refer to typical cases of dispute underlying calls of performance bonds, was incompatible with the context of simple-demand guarantees. As was the case with respect to similar concerns that had been expressed with regard to paragraph (1)(b) and (c), it was pointed out that the purpose of article 19 was to define impropriety of a demand, rather than to refer to the subjective factor of the degree of knowledge required by the guarantor/issuer or a court in any given case for payment to be interrupted. It was suggested, however, that subparagraphs (c) and (d) might be clearer if they began with the words "there can be no doubt that ... ".

33. As regards subparagraph (d), the question was raised whether the reference there to "misconduct" on the part of the beneficiary that prevented performance of the secured obligation was perhaps unnecessarily narrow and might be broadened to refer generally to the conduct of the beneficiary. In response, it was recalled that the Working Group had decided that paragraph (2) should enshrine, as examples of types of improper demands, clear cases of impropriety and that it was for that reason that reference was made to misconduct.

34. After deliberation, the Working Group agreed that the substance of paragraph (2) was generally acceptable.

* * *

Article 20. Set-off

35. The view was expressed that the reference to a right of set-off on the part of "another person authorized to effect payment" might create problems particularly in those instances where the other person might have a personal debt against the beneficiary and might wish to avoid payment by raising a claim for set-off. In support of the deletion of those words, it was stated that they extended the scope of set-off beyond what should be recognized in the draft Convention. Furthermore, it was stated in this regard that the rule was irrelevant, if that person had no obligation to pay. After

discussion, the Working Group agreed that the words "or another person authorized to make payment" should be deleted.

CHAPTER V. PROVISIONAL COURT MEASURES

Article 21. Provisional court measures

Paragraph (1)

36. The Working Group recalled that the basic intention underlying article 21 was to prevent the beneficiary from receiving funds on an improper demand. Some doubts were expressed, however, as to the necessity of maintaining article 21 in the draft Convention. In support of deletion, it was stated that the law on injunctive relief was well established in some States and that any attempts to establish rules on injunctive relief peculiar only to independent guarantees and stand-by letters of credit would create obstacles to wide adherence to the Convention. It was further stated that the "high probability" test for the granting of provisional measures as currently drafted in article 21 set a threshold that would be considered too low in some States, thus enlarging and encouraging the possibility of granting injunctions, and that the test for provisional relief should rather be formulated along the lines of "manifest and clear" evidence of impropriety.

37. In favour of the retention of article 21, it was stated that it was very important to establish the right of access to the courts by the principal/applicant to prevent the beneficiary from receiving funds on an improper demand. In such instances, it was stated, it was also important to clearly define the basis of court action so as to limit interference on the basis of mere suspicion, something which would seriously compromise the independence of the undertaking. It was further stated that, as had been noted by the Working Group at its twentieth session (see A/CN.9/388, para. 39), one of the central purposes of the draft Convention was to unify and harmonize the law in the area of fraud and abuse and that including rules on provisional court measures was an essential element in achieving that aim. As regards the test of "high probability", it was stated that it was a reasonable test for the granting of provisional measures since, if the test were set too high, then the court would in effect be making a final determination on the matter.

38. After deliberation, the prevailing view was that article 21 should be retained. The Working Group then considered how to craft a more defined test than "high probability" for the granting of provisional measures, so as to meet the concerns that had been raised. One suggestion was that article 21 should not refer to any test as such but should leave the decision on the circumstances under which to grant provisional measures to national law. Another suggestion was to apply the rule that provisional measures should only be granted on the basis of prima facie evidence of an improper demand. These suggestions did not, however, gain support. In support of maintaining the test of "high probability" it was stated that it was important to use terms that did not have a unique meaning in any particular jurisdiction or legal system, but that clearly indicated to the judge that provisional measures should not be granted lightly.

39. Another proposal regarding the basis on which the court could issue provisional measures, and one that was found generally agreeable, was that article 21 qualify the evidence leading to the decision as having to be serious and plausible. Various proposals were made as to how specifically to qualify such evidence. One proposal was to provide that the evidence should be "manifest and clear". This, however, was objected to on the basis that those words are used in article 17 in a

different context. Another proposal was to provide that the court should only make a decision to issue provisional measures on the basis of "material" evidence. This was also objected to on the ground that the word "material" might be taken to mean the production of documentary evidence, an understanding that would be too restrictive. After deliberation, the Working Group agreed that a phrase along the lines of "immediately available strong evidence" could be used as it indicated that the evidence must not only be present and available, but must also be strong. The Working Group referred the implementation of the agreed formulation to the drafting group.

40. With regard to the words in square brackets "[or that funds of the guarantor/issuer or of the beneficiary are blocked]", it was suggested that they should be replaced by the words "that the proceeds of the guarantee are blocked" so as to specify that the words were applicable not to any funds that might belong to the guarantor/issuer, but only to the amount that corresponded to the amount of the undertaking. This suggestion was referred to the drafting group. Furthermore, the question was raised whether the court should take into account on its own motion the interests of the beneficiary if, for example, the guarantor/issuer did not oppose the provisional measure.

41. The view was also expressed that the last part of article 21 (1), regarding the "balance of convenience" test, was heavily weighed on the side of the principal/applicant as it did not mention that account should also be taken of the harm that the beneficiary was likely to suffer as a consequence of the provisional order. The Working Group, however, decided to retain those words unchanged, since it was felt that the formulation, along with the provision in paragraph (3), allowed adequate space for the interests of the beneficiary to be taken into account.

Paragraph (3)

42. The Working Group noted that the main new element in paragraph (3) involved modifying the term "security" to the term "form of security" so as to avoid a narrow, technical interpretation of the provision. It was pointed out that the intention of paragraph (3) was to provide the court with the ability to impose such measures as it would deem fit to protect the interests of the parties. A proposal was made that it might be preferable to state in a more general manner that the issuance of an injunction may be subjected to any conditions as would be necessary to preserve the interests of the parties rather than stating the means by which this could be done. In objection to that proposal, it was stated that such a provision might be too general, leaving room for an excessive degree of discretion and increasing the risk of abuse. Furthermore, it was pointed out, paragraph (3) was not specifically geared to protect the interests of the beneficiary, but was also meant as a discretionary measure which would enable judges to apply measures that would limit the filing of spurious or ill-founded actions. After deliberation, the Working Group retained paragraph (3) unchanged.

Paragraph (4)

43. A suggestion was made that paragraph (4) was too restrictive since, under certain circumstances, a court may wish to issue an injunction on some other basis than improper demand or the use of an undertaking for illegal purposes. It was pointed out, however, that these restrictions only related to the type of injunctions issued pursuant to paragraph (1) of article 21 and that such injunctions should be so restricted. The Working Group thus retained paragraph (4) unchanged.

CHAPTER VI. JURISDICTION

Article 24. Choice of court or arbitration

44. Pursuant to the decision of the Working Group at the twentieth session (see A/CN.9/388, para. 84), and following on consultations that had taken place between the secretariat of the Commission and the Secretariat of the Hague Conference on Private International Law, the Working Group had before it a variant of chapter VI in addition to the one that had been considered at the twentieth session (A/CN.9/WG.II/WP.76/Add.1). According to the earlier variant, the choice and determination of jurisdiction were non-exclusive. The new variant rendered the choice of jurisdiction by the parties under article 24 exclusive, while effect of a determination of court jurisdiction, under article 25, would essentially remain non-exclusive. In order to address the concern that had been raised about providing for exclusive effect of a choice of jurisdiction by the parties in the absence of a scheme for recognition and enforcement of the decision, a safety valve was included in subparagraph (d) of article 24 bis. That provision would enable a court other than the one chosen by the parties to take jurisdiction if the decision of the chosen court was not capable of recognition or enforcement. Article 24 bis also set forth a number of additional exceptions to exclusivity of a choice of court by the parties.

45. On the basis of the texts before it, the Working Group resumed its consideration of whether to include chapter VI in the draft Convention. As had been the case previously, doubts and hesitations were expressed in that regard. Various interventions were made to the effect that a chapter on jurisdiction was unnecessary and beyond the essential scope of the Convention. Reference was made to the fact that regional conventions on jurisdiction and recognition and enforcement of judgments existed, in particular the Brussels and Lugano Conventions on jurisdiction and enforcement of foreign judgments in civil and commercial matters, and the Inter-American instrument in this sphere. It was also pointed out that the Hague Conference on Private International Law was embarking on the preparation of a global convention. Another objection to inclusion of provisions on jurisdiction, at least along the lines of those presented in the draft, was that they were incomplete. Reference in this regard was made in particular to the absence of rules on recognition and enforcement of judgments, which was said to be the important twin element that should to be added to the provisions on jurisdiction.

46. It was further suggested that a model for a more complete set of provisions could be found in the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 21 June 1993). In addition to containing provisions on jurisdiction, that Convention contained provisions not only on recognition and enforcement, but also on several other issues, for example, notification of the defendant of an application for court measures. It was further suggested that, in addition to filling gaps, the meaning of some of the provisions in the draft of chapter VI might have to be considered further, for example, that of subparagraph (c) of article 24 bis. It was questioned whether the reference there to a chosen court declining to exercise jurisdiction suggested a rule of forum nonconveniens. The view was expressed that prior to engaging in what might be a time-consuming exercise of addressing the various concerns that had been raised regarding chapter VI, the Working Group should, in the limited time remaining, turn first to further review of the substantive provisions of the draft Convention.

47. In support of retaining chapter VI, it was stated that the chapter, though incomplete, contained rules that were basically sound and could do no harm and that would be useful from a practical

viewpoint. It was also suggested that the existence of multilateral jurisdiction, recognition and enforcement schemes, which, to the extent they existed, were on a regional basis, should not preclude the inclusion of chapter VI. A further ground cited for dealing in the draft Convention with jurisdiction and related issues was that the matter could just as well be dealt with, as regards independent guarantees and stand-by letters of credit, in one instrument along with the substantive rules, and that the work would be carried out more appropriately within the context of the elaboration of the substantive rules themselves. By way of a possible middle ground between the approach in the current version of the draft Convention, and a fuller array of provisions as suggested above, the proposal was made to include a relatively simple provision that, without disturbing existing procedural rules concerning jurisdiction in force in contracting States, would establish the right of court access to the claimant and recognize freedom of contract as regards choice of jurisdiction.

48. On the basis of the views that had been exchanged, the Working Group decided to postpone further consideration of whether to retain chapter VI, and of its possible content were it to be retained, until after further review of the substantive rules in the draft Convention.

* * *

CHAPTER VII. CONFLICT OF LAWS

Article 26. Choice of applicable law

49. In its deliberations on article 26 the Working Group first considered whether or not provisions on conflict of laws should be included in the draft Convention. In support of the view that it was not necessary to include such provisions in the draft Convention, it was stated that the usefulness of the provisions would be limited unless they formed part of a complete regime of choice-of-law provisions. In response, it was stated that inclusion of such rules in the draft Convention would strengthen the reliability and utility of the instrument covered by recognizing party autonomy in the choice of law and by reducing the extent to which disputes would arise in relation to determination of the issue of applicable law. After deliberation, the prevailing view was that the draft Convention should contain provisions on applicable law.

50. A concern was expressed that the approach used to describe the scope of the choice-of-law provision ("rights, obligations and defences relating to an undertaking") might not be wide enough to encompass all issues relating to the instrument on which disputes might arise. It was suggested that it might not, for instance, cover the formation of the undertaking and other issues that should be covered by the choice-of-law provisions, and that this inference might be reinforced from the fact that the title of chapter IV was "Rights, Obligations and Defences". An alternative was proposed which would refer to "the relationship between the guarantor/issuer and beneficiary" as the subject matter of the choice-of-applicable-law provision. It was said that the approach was favoured in other international conventions such as the 1980 Rome Convention on the Law Applicable to Contractual Obligations. It was pointed out, however, that that approach, though perhaps suitable where the undertaking would be construed in contractual terms, might be inappropriate where the undertaking would not be considered contractual in nature. It was noted that the use of such a term to describe the undertaking had been rejected by the Working Group at an earlier session. It was further said that the terms "rights, obligations and defences" was wide enough to cover the formation of an

undertaking. Another proposal was to refer generally to the undertaking as being governed by the chosen law. The Working Group referred the matter to the drafting group.

51. After deliberation, the Working Group agreed that the substance of article 26 was generally acceptable.

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Article 27. Determination of applicable law

52. The view was expressed that article 27, instead of referring to the place of business of the guarantor/issuer, should refer instead to some other place, based on a flexible formula. In support of a flexible approach, reference was made to the complexity in applying a simple "place of business" rule in the context of issuance of "dematerialized instruments". A proposal to address those concerns was to refer to the law of the relevant transaction which was the subject of the dispute under the undertaking and to which the undertaking was most closely connected. Such an approach, however, did not win sufficient support. Another proposal was to combine the flexibility of that approach with a general guidance to courts to look to the place of issuance. According to the latter proposal, the text would read along the lines of "failing a choice of law in accordance with article 26, ... the undertaking is governed by the law of the State with which it is most closely connected, which is usually the place where it was issued". The prevailing view, however, was that, while the proposed approaches would have a benefit of reflecting some approaches taken in regional conventions on the subject, the aim of article 27 was to give a more specific and certain rule, for the context of independent guarantees and stand-by letters of credit and that it should refer to the place of business of the guarantor/issuer.

53. At the same time, the Working Group, in order to add more precision to the rule, in particular as regards contexts of issuance such as branch-banking, agreed to refer more precisely to the law of the state where the guarantor/issuer has that place of business at which the undertaking was issued.

54. The Working Group affirmed that article 27 applied to counter-guarantees, confirmations, and other undertakings subject to the draft Convention, even though they were not specifically referred to therein. This was in line with the working assumption generally in the draft Convention as to its scope of application. It was noted that, were it felt desirable to make a more explicit statement concerning the coverage of counter-guarantees and confirmations, this could more appropriately be done with a general provision in article 3.

CHAPTER I. SCOPE OF APPLICATION

Article 1. Scope of application

Paragraph (1)

55. A question was raised as to the necessity to refer to the rules of private international law in paragraph (1) as an independent basis for the application of the draft Convention, alternative to the issuance of the undertaking in a contracting State. The view was expressed that the relevance of such

a provision would be limited to those instances where the parties made a choice of law since, if they did not, then article 27 would apply and the applicable law would be the law of the place of issuance of the undertaking. Furthermore, it was stated that including the provision would create a system that would be complicated, in particular, in those cases where the parties chose to apply the law of a contracting State but the undertaking was issued in a non-contracting State. Then the parties would have to be very specific about their choice of the law of the contracting State, if they did not wish the draft Convention to apply. The proposal to delete the reference to rules of private international law did not, however, receive support. It was noted in this regard that the draft Convention reflected the approach used in the United Nations Convention on Contracts for the International Sale of Goods.

56. The Working Group affirmed that applicability of the draft Convention based on the place of issuance of the undertaking in a Contracting State and applicability based on the rules of private international law were two different tests and not a double test. It was suggested that this might be made clearer were the two references separated by adding the words "if not, if" between the words "or" and "the" so as to read: "... if it is issued in a contracting State or, if not, if the rules of private international law lead to the application of the law of a contracting State ...". The Working Group referred the proposal to the drafting group.

57. A query was raised as to why the parties should be given the right to exclude the application of the Convention, which, once ratified, would become the law of the contracting State. It was stated that the matter was further complicated by the presence of paragraph (3), which made chapters V, VI and VII applicable even in those cases where the Convention was not applicable pursuant to the scope provision in paragraph (1). It was said that this would also leave the impression that all the other provisions were not mandatory, a matter which was still to be considered by the Working Group on an article by article basis. A related suggestion with regard to the right of parties to exclude the Convention was that paragraph (1) should state that the parties could exclude the draft Convention "either in part or in whole", rather than referring simply to the choice of either applying or excluding the Convention as a whole.

58. In reply to these concerns it was pointed out that two separate matters were involved: the first, which was addressed in the affirmative in article 1, was whether the parties had the right to exclude the draft Convention. The second, separate matter was, once the draft Convention did apply, the identification of the provisions that would be subject to party autonomy. As regards the manner of distinguishing between mandatory and non-mandatory aspects of the draft Convention, it was pointed out that, rather than establishing a list of all the mandatory provisions in the draft Convention, a better solution might be to indicate party autonomy in those instances where it was relevant. The question was not relevant to all aspects of the draft Convention, for example, article 1.

59. A further question was raised as to the form in which exclusions of the Convention could be made. It was pointed out in this regard that paragraph (1) stated that exclusions should be made in the undertaking, while the exclusion of the draft Convention might be agreed in an amendment of the undertaking pursuant to article 8. In response, it was pointed out that the expression "undertaking" would have to be understood as encompassing any amendments that had been made by the parties to the undertaking as originally issued. It was recalled that a rule of interpretation to that effect had been included but later deleted, and that it might be useful to reinstate such a rule of interpretation in the text for purposes of clarity. As to whether exclusion of the draft Convention should be permitted to be made elsewhere than on the face of the undertaking, the Working Group noted the concern that allowing exclusions that would not appear on the face of the undertaking documents would raise undesirable risks and uncertainties for third parties relying on the information appearing on the face

of the instrument (e.g., in the negotiation context). Accordingly, the Working Group agreed that any agreements regarding exclusions of the Convention would have to be made within the instrument, although a different conclusion could be reached for the use of "system rules" to exclude application of the draft Convention, as in the case, for example, of the use of SWIFT messages to issue undertakings.

60. The above discussions on the form of exclusions of the draft Convention prompted the Working Group to note that, in its review of the draft articles, it would have to ensure that the words "unless otherwise ... elsewhere agreed ...", which appeared at various points, only were used to refer to stipulation by the parties made outside of the undertaking documents, and were not inadvertently used to refer to a stipulation in an amendment to the original terms of an undertaking.

61. It was noted that the reference to opting out of the draft Convention itself did not refer to the exclusion of national law, even in those instances where national law might be equivalent or similar to the provisions of the draft Convention. The understanding was that, if the application of the Convention were to be excluded, then the undertaking would be subject to the law that would have applied in the absence of the Convention.

62. Lastly, the Working Group discussed the relationship between the formulation used in paragraph (1) regarding the scope of the Convention and the wording in article 27 regarding determination of applicable law. It was felt to be important that the rule defining the scope of application of the Convention and the rule on the determination of applicable law be expressed in a parallel manner. There was general agreement that the two provisions should refer in a similar manner to the place of business of the guarantor/issuer at which the undertaking was issued and the matter was left to the drafting group. It was also pointed out that it might be necessary to consider making some changes to article 6(i) so as to take into account those instances where the guarantor/issuer might have different places of business, in particular branches, in different jurisdictions.

Paragraph (2)

63. The Working Group considered the question whether or not paragraph (2) of article 1, which allowed parties to make the draft Convention applicable to commercial letters of credit, should be retained in the draft Convention. In favour of deletion, it was said that the provision could seem ambiguous as to exactly the instruments intended to be covered. It was said that the uncertainty stemmed from the fact that the draft Convention did not contain a definition of the term "commercial letter of credit." It was also stated that, in any event, even without such a provision in paragraph (2), parties that wished to apply any part of the draft Convention to any instrument could do so as it was not possible to prohibit such action. It was further said that the coverage of any instrument that would not otherwise be regarded as an "undertaking" under the draft Convention, if that were thought to be desirable, could be achieved by amending the definition of "undertaking" in Article 2 (1). That approach, however, failed to attract sufficient support, as the Working Group thought it to be preferable rather to include a provision along the lines of paragraph (2).

64. Another proposal was to broaden paragraph (2) by making it a general opting-in provision that referred to "other independent undertakings" and did not restrict the possibility of opting-in solely to commercial letters of credit, as was the case in the current draft. In support of the proposal it was said that there were several other types of undertakings in wide use that could usefully be subjected to the draft Convention, including, for example: irrevocable reimbursement obligations; instruments drawn in relation to pre-advice under article 11 of the UCP; and commitments to purchase documents

relating to demands for payment. It was said that the latter arose in situations where banks not prepared to add a confirmation, for example, for foreign exchange restrictions, would instead issue an irrevocable commitment to purchase the relevant documents of the demand. The Working Group was not prepared, however, to broaden paragraph (2) as proposed. In opposition to the proposal it was said that the draft Convention had been developed with independent guarantees and stand-by letters of credit in mind and a general opting-in provision would bring into the scope instruments whose character was not considered in the elaboration of the draft Convention.

65. The Working Group then turned its attention to a proposal to amend paragraph (2) to provide for automatic coverage of commercial letters of credit by the draft Convention, rather than merely providing for an opting-in possibility. In support of the proposal, it was said that commercial letters of credit were of the same legal nature as stand-by letters of credit, which was evidenced by the fact that they were subject to the same rules of practice. In opposition to the proposal, it was said that the draft Convention had been developed with independent guarantees and stand-by letters of credit in mind, and its provisions might not be appropriate to commercial letters of credit. In response, it was said that any attempt to differentiate between stand-by letters of credit and commercial letters of credit was artificial, as the two instruments were indistinguishable and the preparation of the draft Convention presented a historic opportunity to accord to commercial letters of credit the benefit of its rules. An overriding consideration in the consideration of this issue was that a number of delegations indicated that they could not take a definitive stand on the matter as they had not anticipated its discussion at the present session and did not therefore have an opportunity to consult in their countries on the matter. It was noted that the issue of extending coverage of the draft Convention to commercial letters of credit was likely to be raised again and that it would therefore be useful for such consultations to be held. The Working Group therefore decided, at least at this stage, not to accept the proposal.

66. As regards the formulation of paragraph (2), it was decided to use the words "letter of credit other than a stand-by letter of credit" rather than the words "commercial letter of credit", in particular since the term "commercial letter of credit" was not defined in the draft Convention. The question of whether to delete the word "also" was referred to the drafting group.

67. Subject to the above decision, the Working Group found the substance of paragraph (2) to be generally acceptable.

Paragraph (3)

68. The Working Group noted that the effect of paragraph (3) was that the provisions of chapters V (article 21, provisional court measures), chapter VI (articles 24 to 25 bis, jurisdiction) and chapter VII (articles 26 and 27, conflict of laws) would apply irrespective of whether, in any given case, the Convention would be applicable by virtue of article 1(1). While a concern was voiced as to the desirability of independent applicability of part of the draft Convention in such a manner, the Working Group was prepared to accept such an approach in relation to chapter VI, if that chapter was in the end retained, and chapter VII. However, it was generally agreed that the reference to chapter V should not be included in paragraph (3).

Article 2. Undertaking

Paragraph (1)

69. As had been the case when the scope provisions were considered on previous occasions, the concern was expressed that the formulation in the draft Convention should avoid the risk of inadvertently, at least in some jurisdictions, encompassing certain private undertakings of an independent nature. Such promises might be made, for example, to renew a legal obligation. A concern was also expressed as to inadvertent inclusion of surety bonds and promissory notes. The view was expressed that the current draft did not address that risk sufficiently. It was proposed to meet that concern by referring in paragraph (1) specifically to independent guarantees and stand-by letters of credit, by adding words along the lines of "as referred to in common banking practice". An alternative proposal to meet the concern was to expand the list of express exclusions in subparagraph (b).

70. While it was pointed out that the express intent of the draft Convention was to encompass only independent undertakings, thereby excluding surety bonds, and that it was not intended to cover private or consumer transactions, the Working Group felt that it would be desirable to make the scope provision clearer. This was particularly so since there admittedly were other undertakings, not intended to be covered, that did possess an element of abstraction, thereby conceivably leading to the possibility of some confusion, as unlikely as some might consider that to be. This risk also stemmed from the nature of article 1, which did not, as shown by the title of the draft Convention, fully define the field covered, relying instead on a more general description. It was agreed that additional clarity could in fact be achieved, as proposed, by adding to subparagraph (a) words such as "usually referred to as independent guarantees or stand-by letters of credit". It was noted that this added degree of precision would remove the need for retaining subparagraph (b), since it would now also be clearer that instruments such as insurance contracts were outside of the scope of the draft Convention.

71. A proposal was made to add a provision to article 2 to make it clear that the draft Convention did not venture to regulate questions of capacity to issue undertakings, something which the Working Group affirmed was never intended to be covered. It was suggested that without a clarification on this point, particularly in view of the open-ended reference to "guarantor/issuer" in subparagraph (a), there might be uncertainty. The concern was expressed that, in the absence of such a clarification, States might contemplate a declaration or reservation on the point, and a text along the following lines was therefore proposed: "The Contracting States will maintain the freedom to determine the categories of persons or institutions competent to issue undertakings referred to in paragraph (1)". The view was expressed that adding such a provision would clarify the matter more effectively than an alternative approach that was suggested, namely, to set forth the clarification in a footnote.

72. While emphasizing that the draft Convention did not at all intend to regulate questions of competence or capacity to issue undertakings, the Working Group declined, however, to make the suggested change, since it was felt that the matter was already sufficiently clear. Furthermore, it was pointed out that, since there was a whole range of issues that were not regulated by the draft Convention, including some possibly raising questions of competence, to address the point with respect to just one aspect of the draft Convention might create uncertainty with respect to those other aspects of the text. For example, it might inadvertently suggest that, with respect to provisional court measures, the draft Convention was delving into the question of the competence of particular courts to act.

73. Suggestions of a drafting nature were made and referred to the drafting group. One such suggestion was that the word "indicating", used in the phrase "indicating that payment is due ...", might, at least in some languages, compromise the independent, documentary character of the undertaking. Use of the word "signifying" was suggested as a replacement. Another concerned the word "contingency". It was emphasized that the concept that should be conveyed by that term did not involve unforeseen events, not envisaged in the undertaking, but rather events the eventual occurrence of which was uncertain.

74. A further suggestion was that subparagraph (a), in referring only to a "simple demand or upon presentation of documents" might inadvertently preclude an undertaking referring simply to the presentation of documents in order to trigger payment, without any reference to a "demand" for payment as such. After deliberation, however, the Working Group took the view that the existing formulation was satisfactory, and that undertakings not literally referring to a demand as such would not necessarily fall outside the provision.

Paragraph (2)

75. The Working Group found the substance of paragraph (2) to be generally acceptable.

Paragraph (3)

76. With regard to subparagraph (a), the proposal was made to delete the words "in a specified currency or unit of account" as they referred to something that was self-understood. The Working Group agreed, however, to retain the provision in its existing form.

77. Although the view was expressed that it was not necessary to add in subparagraph (b) the parenthetical reference to "draft", in juxtaposition with the term "bill of exchange", the Working Group decided to retain the additional term. It was felt that this added degree of descriptiveness, at least in those languages where two separate terms existed, would ease application of the draft Convention in those jurisdictions where the term "draft" was used as a functional equivalent of "bill of exchange". It was noted that a similar approach was used in the UCP, reflecting general banking use of "draft". The Working Group declined to support the addition of a reference to payment by way of a promissory note. It was recalled that paragraph (2) should be regarded as an illustrative or indicative, rather than exhaustive, listing of forms of payment. Accordingly, the intent of the provision in this case was to give an example of what was a frequent form of payment in the type of undertaking dealt with by the draft Convention. Also failing to attract sufficient support was a proposal to add an explicit reference in subparagraph (b) to the specification of a currency. In the same light, the Working Group agreed to the deletion of the reference to "a specified amount".

78. The view was expressed that subparagraph (d) ("supply of a specified item of value") should be deleted since it referred to what might be considered a rather unusual form of payment, and even illegal in some States. The prevailing view, however, was that the provision should be retained.

Paragraph (4)

79. The Working Group noted that a reference had been added to paragraph (4) referring to the designation by the guarantor/issuer of one of its branches as the beneficiary, provided that in such cases the undertaking expressly stated that the draft Convention was to apply. That reference had been added pursuant to the decision at the twenty-first session that the draft Convention should not

preclude the possibility of a designation of a branch as beneficiary (A/CN.9/391, para. 20). With the addition of that text, paragraph (4) now referred to two distinct cases, the other being the designation of the guarantor/issuer itself as the beneficiary when it was acting in favour of another person.

80. Upon consideration of the additional text, some doubts were expressed as to the advisability of referring to the case of the designation of a branch of the guarantor/issuer as the beneficiary. The view was expressed that, to the extent that they might arise, such cases were unusual and would be difficult to fit into the confines of the draft Convention without possibly raising questions beyond its scope, in particular questions of company law. In particular, the question might arise in any given case whether a branch was a legally distinct entity from the rest of the corporate body. In addition, it was suggested that the provision would raise the anomalous spectre of a branch taking legal action against another part of the corporate entity such as the main office to assert rights under the draft Convention. A question was also raised as to whether it was intended that in the branch case the draft Convention would be applied even in a purely domestic context. In view of the questions raised, the Working Group was urged to delete the reference to branches as beneficiaries, though it was emphasized that such a deletion would not preclude application of the draft Convention by agreement.

81. In support of including the provision, it was pointed out that, though admittedly unusual, there were cases in practice of designation of a branch as beneficiary. The possible cases referred to resulted not only from peculiar commercial and legal circumstances, but included contexts such as nationalization of a branch, which might be viewed as conferring upon a branch a more distinct character. A similar reference was made to the insolvency context, in which various branches of a bank in different countries may be placed under the supervision of bankruptcy trustees. The view was also expressed that precedent might be found in the UCP for distinguishing between different parts of a corporate entity as guarantor/issuer and beneficiary, since that text contained the rule that, for the purposes of the UCP, different branches of a bank were to be considered different banks. Reference was also made to a distinction of that type found in the UNCITRAL Model Law on International Credit Transfers. However, even from the standpoint of favouring application of the draft Convention in such cases, some dissatisfaction was expressed with the current formulation, according to which the draft Convention would apply only if expressly so stated in the undertaking. It was said that this apparently precluded an agreement by the parties elsewhere than on the face of the undertaking. A better approach to applicability of the draft Convention in such cases, it was said, might be simply to say nothing about the matter in the draft Convention.

82. After deliberation, and in light of the various views that had been expressed, the Working Group decided to delete the reference to the branch-as-beneficiary case. The Working Group emphasized, however, that the deletion of that text was not intended to preclude application of the draft Convention in such cases.

Article 3. Independence of undertaking

83. A suggestion was made that article 3 should indicate with greater specificity the independence of the counter-guarantee from the first guarantee and also from the underlying transaction. It was stated that the words "or to any other undertaking", though aimed at making clear this principle, did not do so adequately. It was proposed that in order to make clear the intention of the provision in this respect, the text should be expanded to include words along the following lines: "a counter-

guarantee is independent from the guarantee to which it relates and also from the underlying transaction". It was pointed out that this formulation would also have the benefit of clearly reflecting the position in a similar manner to an equivalent provision in article 2 (c) of URDG.

84. The Working Group agreed that the principle of the independence of a counter-guarantee, provided that it met the general test of independence in article 3, should be clear in the draft Convention. To this extent, some support was expressed for a clarification of the point in article 3. However, doubts were expressed as to whether the proposed wording might inadvertently go beyond the scope of article 3 by stating a general rule that counter-guarantees were independent, without reference to the general requirements to be met by undertakings in order to be independent. It was suggested that it would be better to maintain the present formulation, but to make it clear that it referred also to the independence of counter-guarantees by adding words such as "(including guarantees to which counter-guarantees relate)" after the words "or to any other undertaking".

85. Concerns were expressed, however, about making any specifications in article 3 with regard to the question of the independence of the counter-guarantee. It was pointed out that article 3 was placed in chapter I, dealing with the scope of application of the Convention, and should thus be limited to issues regarding scope and should not contain substantive operational rules. Furthermore, and along the same lines, it was stated that article 3 was meant only to establish the attributes that undertakings (which, pursuant to article 6(a), included counter-guarantees) would have to meet to be considered independent and thus to fall within the scope of the Convention, but not to state that counter-guarantees were independent. In this regard, it was emphasized that the words "or to any other undertaking", should be read together with the definition of "undertaking" in article 6 (a), which stated that an "undertaking" could also include a counter-guarantee. It was stated that the words could then also be read and understood to mean "or to any other guarantee", thus encompassing the context of a counter-guarantee. After deliberation, the prevailing view in the Working Group was that the words "or to any other undertaking" should be retained in their present form (for further discussion on this issue, see para.130).

86. A query was raised as to the effect the principle of the independence of the counter-guarantee from the first guarantee would have in those instances, for example, where there was fraud involving the first guarantee, and as to what would constitute fraud in the counter-guarantee. In response, it was pointed out that such a problem was not directly related to the independence of the counter-guarantee as such, but was related to the question of improper demand dealt with in article 19 and in which there was no distinction made between the first guarantor and the counter-guarantor as far as improper demand was concerned. It was suggested that any further clarification of the point might be considered in that context.

87. The Working Group then considered which of the two formulations in square brackets, "[not]..." or "[except presentation of documents or another such act or event]...", should be retained preceding the words "falling within the guarantor/issuer's operational purview". Preference was expressed for the retention of the second variant on the ground that it better and more clearly dealt with the concept of non-documentary conditions. A further proposal was made, however, to describe more clearly that the last phrase in article 3 was aimed at non-documentary conditions, and that some examples could even be provided of instances when the provision would be applicable. In support of that proposal it was stressed that the words "operational purview" were not very clear and were thus open to differing interpretations. It was pointed out that, while in some jurisdictions the courts might treat any act that a bank undertook to perform as within that bank's operational purview, in other jurisdictions any act that went beyond normal banking business would be regarded as outside the

operational purview of the bank. A suggestion was made that, if the words "in its banking business" were added to the end of the sentence, it would help clarify the matter. This was objected to, however, on the basis that the Working Group had decided not to limit the notion of "guarantor/issuer" to banks.

88. In concluding its discussion of article 3, the Working Group recalled that it had discussed at length the question of non-documentary conditions at previous sessions, most recently at the twenty-second session (see A/CN.9/391, paras. 22 to 33), and had arrived at the current formulation set out in article 3 as a compromise taking into account the various viewpoints and considerations that had been raised. It was pointed out that it would be difficult to arrive at a common understanding of what was meant by the term "operational purview" and that a better solution would be to leave the text unchanged, with the result that those words would be interpreted by courts taking into account the context and relevant facts. After deliberation, the Working Group decided to retain the words along the lines of "except presentation of documents or another such act or event," and requested the drafting group to consider whether a term more generally clearer than "operational purview" could be found.

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Article 4. Internationality of undertaking

Paragraph (1)

89. The Working Group focused on whether to retain the reference to the place of business of the confirmer in the list of parties whose places of business were relevant to a determination of internationality of the undertaking. The discussion was spurred by a number of questions that were said to arise from inclusion of such a reference. Those questions included, for example, whether, if the confirmer and the beneficiary were in the same country, the confirmer's relationship with the beneficiary should be governed by the draft Convention, the extent to which the matter should be viewed through the prism of a single transaction, and whether the provision should also include a reference to the place of business of the counter-guarantor.

90. In favour of deleting the reference to the confirmer, the view was expressed that the guarantor/issuer's relationship with the beneficiary should be viewed in the light of its separate character. It was said that, in particular when the confirmer and the beneficiary were in the same country, this separate undertaking might be considered a domestic affair that should not be used for determining the internationality of the guarantor/issuer's undertaking to the beneficiary. It was said that a reference to the confirmer might lead to anomalous results, for example, in the case where, subsequent to the issuance of an undertaking by a guarantor/issuer to a beneficiary in the same country, a confirmation is added by a confirmer in a foreign country. Questions were also raised as to the implications for this matter of conflict-of-laws rules, including any references to such rules as contained in the draft Convention.

91. Various views were adduced in favour of retention of the reference to the confirmer. One such view was that the internationality of the undertaking should be determined from the perspective of the entire transaction, including not only a possible confirmation, but also taking into account the possible presence of a counter-guarantee. A proposal to this effect was made along the following lines: "For

the purposes of the present Convention, guarantees, counter-guarantees and confirmations relating to an international undertaking are themselves international undertakings". It was pointed out that the effect of such a provision could be to render a purely domestic undertaking international by virtue of a counter-guarantee issued in another country. A drafting refinement suggested for the proposal was, for the purposes of clarity, to use instead words along the lines of "relating to, or in support of, an international guarantee".

92. While the Working Group was not prepared to expand the scope of paragraph (1) to include a mention of the place of business of the counter-guarantor, the prevailing view was that the reference to the confirmer should be retained. It was suggested that the case of confirmation differed from that of the counter-guarantee from the standpoint of determining internationality of an undertaking. Attention was drawn to the fact that, in the typical case of confirmation, the guarantor/issuer and the beneficiary would be in different countries, and the confirmer would be in the same country as the beneficiary. In such a typical context, the beneficiary would request confirmation for the very purpose of being able to make the demand for payment in its own country. By contrast, the guarantor/issuer of a guarantee supported by a counter-guarantee could typically be in the same country as the beneficiary, to the effect that that domestic guarantee would be transformed into an international undertaking subject to the draft Convention by virtue of the addition to paragraph (1) of a reference to the place of business of the counter-guarantor. Aside from general hesitation about such an expansion of the scope of application of the draft Convention, questions were raised, for example, as to the effect under such an expanded approach of issuance of the first guarantee in a non-contracting State. That question was raised with particular reference to the rule in article 27 that, absent a choice by the parties, the law applicable to the undertaking was the law of the place of issuance.

93. After deliberation, the Working Group agreed to the retention of the reference to the confirmer, and declined to expand the scope of the provision to refer to the counter-guarantor. In the conclusion of the deliberations on paragraph (1), it was noted that the possibility would exist in the future for a further exchange of views on the provision should additional perspectives be developed on the matters raised.

Paragraph (2)

94. A view was expressed that paragraph (2) should be deleted because it might raise questions the answer to which could be uncertain. Those questions concerned in particular what would happen if no place of business were specified in the undertaking for a party, or if the place of business specified in the undertaking was not in fact the place of business of the party in question. In response to those concerns, it was pointed out that the purpose of paragraph (2) was to provide a clarifying rule for those cases in which there already was some uncertainty due to the information specified in the undertaking, uncertainty due either to the listing in the undertaking of more than one place of business for a party, or due to the listing of a residence rather than a place of business. It was also pointed out that a similar rule was found in other international texts, such as the United Nations Convention on Contracts for the International Sale of Goods.

95. Several proposals were made to modify the rule in the present text of paragraph (2), none of which in the end were supported by the Working Group. One such proposal was to provide that, in the case of a listing of more than one place of business, any one of the places listed could be considered for the purposes of determining internationality. Another proposed amendment was to replace the reference to the "place which has the closest relationship with the undertaking" with a

reference to the place where the documents are to be examined. It was pointed out with regard to the latter proposal that paragraph (2) was meant to have a broader application than merely to the guarantor/issuer and that therefore the proposed change would unduly narrow the scope of the provision. Another proposal was to try to address the concerns that had been raised regarding paragraph (2) by removing in paragraph (1) the words "as specified in the undertaking". Yet another proposal was to include a specific reference in paragraph (2) to the "headquarters" of a party in the event of a listing of multiple places of business.

96. A question was raised as to the appropriateness of the reference in subparagraph (b) of paragraph (2) to "habitual" residence. The Working Group affirmed the use of this term, which, it was pointed out, appeared in other UNCITRAL texts including the UNCITRAL Model Law on International Commercial Arbitration (article 1(4)) and the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (article 2(3)).

97. After deliberation and consideration of the various proposals that had been made, the Working Group decided to retain paragraph (2) in its present form. It was noted that, in subparagraph (a), the references to "place" would be replaced by references to "place of business".

Article 5. Principles of interpretation

98. A question was raised as to the meaning of the term "the international practice of independent guarantees and stand-by letters of credit". It was stated that the rationale behind this phrase was to refer to well-established international standards of practice that had been established internationally with regard to independent guarantees and stand-by letters of credit, and to exclude resort to practices of a lower standard than that which had been established and accepted internationally. It was suggested that addition of the word "standard" before the word "international" would better reflect this understanding, and make it clear that reference was not being made to some standard other than the one generally accepted in practice. A further suggestion was made that, since, in interpretation of the Convention, reference would actually be made to banking practice, which was said to be the appropriate reference point, the phrase should in fact refer to "international standard banking practice".

99. Objections were raised, however, to any reference to banking practice. It was pointed out that the issuance of undertakings was not limited to banks under the draft Convention and that the range of types of issuing institutions might increase in the future, therefore suggesting the need for a formulation that was more open to developments in practice. It was stated that the Convention should therefore not limit itself to banking practice. Furthermore, it was pointed out, article 5 did not state that in interpreting the Convention regard should be had to international practice, but that regard should be had to the observance of good faith in international practice.

100. The view was expressed, however, that the understanding underlying the origin of article 5 was that, since the two instruments could be issued by institutions other than banks, it was important to maintain the high standards of fairness and balance that had evolved over time within banking practice and which were reflected in the URDG and the UCP. It was stated that other issuing institutions should not claim that, since they were not banks, they should not be subject to the high standards established in banking practice. It was also pointed out that there might be a need to align article 5 with article 13 (1) which referred to "generally accepted standards of international practice".

101. The Working Group recalled that it had discussed the matter at its eighteenth session (see A/CN.9/372, para.77; A/CN.9/WG.II/WP.76), at which the formulation that was agreed on was "the observance of good faith in international guarantee and stand-by letter of credit practice." After deliberation, the Working Group agreed to revert to that formulation as it better reflected the common understanding with regard to article 5.

Article 6. Definitions

Chapeau

102. The Working Group found the chapeau to be generally acceptable.

Subparagraph (a) ("undertaking")

103. Differing views were expressed as to which of the words in square brackets should be retained ("includes" or "may refer to"). Preference was expressed for retention of the word "includes" on the basis that it better captured the intention of the provision, which was to provide an indicative description of "undertaking" as found in article 2(1). It was stated, however, that, in the Convention, the word "undertaking" could in some instances mean all the described instruments, or, depending on the context, only one of the instruments. It was therefore suggested that the words "may refer to" would be a better formulation. In reply to these concerns it was pointed out that the chapeau of article 6 already provided that the definitions had to be read as required by the context. The Working Group therefore decided to retain the word "includes".

104. It was suggested, and the Working Group agreed, that the reference to "confirmation of guarantee" should be changed to "confirmation of undertaking" so as to also take into account stand-by letters of credit which were in fact the more typical object of confirmations.

105. A view was expressed that it would be useful to make it clear that, in the event of an amendment to an undertaking, the definition of undertaking would extend to the terms and conditions included in the amendment and not just to the original instrument. It was suggested that words such as "and includes all the other terms and conditions to which it refers" would take this into account and also cover any terms and conditions that would be included in the instrument by incorporation. It was pointed out that the Working Group had discussed the matter at its twenty-first session (see A/CN.9/391, para.44) and had decided that such a clarification was unnecessary on the basis that it was self evident that a reference to an undertaking was understood as a reference to the latest version of the undertaking.

106. The Working Group also discussed the question of whether the independence of an instrument was affected by the incorporation by reference to another instrument of the terms and conditions of that other instrument. It was pointed out in this regard that, in most instances, in particular in the case of confirmations, the terms and conditions were not on the face of the instrument but incorporated by reference to the original undertaking. The question was therefore raised whether, since, in article 3, independence was predicated on the undertaking being self-standing, an undertaking that made reference to other instruments should be regarded as not independent and therefore not within the scope of the Convention. The view was widely shared that while there might usefully be a clarification that, if an instrument by its terms and conditions referred to another instrument, it did not thereby lose its independence, such a clarification should not necessarily be

made in subparagraph (a). It was pointed out that the issue was also relevant with regard to counter-guarantees and that it might be more useful to consider the matter when discussing other provisions in the Model Law.

Subparagraph (d) ("counter-guarantee")

107. As had been raised earlier in the session (see paras. 83-85), the suggestion was made that a provision could usefully be added, perhaps in subparagraph (d) of the present article, to the effect that an undertaking did not lose its independence solely by virtue of containing a reference to other undertakings, as might be the case in a counter-guarantee or in a confirmation of an undertaking.

108. While there was no disagreement as to the substance of the proposed rule, the Working Group upon deliberation hesitated to add an express statement to that effect. It was felt that the point was evident from the text of the draft Convention and would be drawn easily by interpretation. The Working Group was also concerned that words such as "referring to the terms and conditions of another undertaking" might blur the matter since such words might not be subject to common interpretation or understanding. It was pointed out that the words might be read narrowly, thus perhaps not clearly taking into account a typical form of a confirmation of a stand-by letter of credit, in which the confirmation itself consisted only of a cover sheet appended to a copy of the original stand-by letter of credit. Any further consideration of adding such text, it was suggested, should be pursued within the context of article 3 (see para.130).

109. The Working Group then turned its attention to the formulation of subparagraph (d). It decided to delete the words in square brackets at the beginning of the text, "or similar instruments". The concern had been expressed that the meaning of those words was unclear and that they might blur the notion of the independence of the undertaking. The Working Group accepted and referred to the drafting group a suggestion to align the reference in subparagraph (d) to "demand and presentation of any specified document" with the more explicit text on the same point that would be included in article 2.

110. The Working Group also accepted a proposal to replace the words "indicating that payment ... has been demanded from ..." by the words "indicating, or from which it is to be inferred that ...". It was felt that the inclusion of such a formulation in the present provision, as well as in article 2, would meet the concern that had been expressed with regard to the use of the word "indicating", namely, that it might be read as requiring an actual statement in the demand that payment was due. Such a change, it was suggested, would make it clear without a doubt that the draft Convention encompassed simple-demand guarantees. Lastly, the Working Group agreed to the retention of the words "or made by", found in the latter portion of the present text in square brackets.

111. Subject to the above decisions, the Working Group found the substance of subparagraph (d) to be generally acceptable.

Subparagraph (e) ("counter-guarantee")

112. The Working Group found the substance of paragraph (e) to be generally acceptable.

Subparagraph (f) ("confirmation")

113. Views were exchanged as to whether or not subparagraph (f) should retain the wording in its latter portion stating that the presentation of a demand for payment by the beneficiary to the confirmer did not make the beneficiary lose the right to demand payment from the guarantor/issuer in the event of rejection or non-payment. It was noted that the wording in question should encompass the situations where a demand was submitted to the confirmer, but was rejected, as well as the case in which the beneficiary decided to demand payment from the guarantor/issuer without having submitted a demand to the confirmer. It was further noted that the wording in question had been added in an attempt to reflect the decision at the twenty-first session that the provision should make it clear that, under the draft Convention, presentation to the confirmer did not extinguish the beneficiary's right to proceed with a demand against the issuer if the confirmer dishonoured (A/CN.9/391, para. 50). According to that decision, the provision was not intended to deal with issues that might properly be settled in the terms of the undertaking, such as the order in which the beneficiary was to exercise its right to demand payment from either the confirmer or the issuer.

114. While a degree of support was expressed for the formulation contained in the present text, a variety of reservations were expressed as to its inclusion and content. The view was expressed that the wording should be deleted as the rule contained therein, that the beneficiary had an option and a right to demand payment from either the guarantor/issuer or the confirmer, was self evident and it was therefore unnecessary to re-state it in subparagraph (f). A concern was expressed that stating the rule in subparagraph (f) might be misconstrued as providing a rule on the order for the presentation of the demand to the confirmer or to the guarantor/issuer. It was also suggested that the rule as formulated did not in fact address the two most common problems that arose in the context of confirmation. Those concerned the rights of the beneficiary where the confirmer received documents but refused to pay, and cases in which the beneficiary went directly to the guarantor/issuer to demand payment. Such an approach may be used by the beneficiary when, for example, the confirmer was insolvent, and there was a fear on the part of the beneficiary that the insolvency trustee might not return documents in the event of non-payment. It was noted that a question of the type that might arise after a rejection by the confirmer was whether a subsequent demand to the guarantor/issuer would be subject to the expiry date of the undertaking or to general prescription rules. It was further observed that a definition section was not the appropriate place to deal with matters relating to the rights of parties to an undertaking, and that, as presently formulated, the text might even be read erroneously as granting a right to the beneficiary to obtain a double payment.

115. In order to address the concerns that had been raised, proposals were made aimed at the deletion of all or various parts of the text reading "without, however, losing its right to demand payment from the guarantor/issuer in the event of [non-payment by the confirmer] [rejection by the confirmer of the demand or payment]". In the end, the Working Group decided that it would be useful to retain the basic statement that a demand for payment from the confirmer as such would not, under the draft Convention, strip the beneficiary of its right to demand payment from the guarantor/issuer. However, the Working Group also agreed to the deletion of the text beginning with the words "in the event", to the end of the subparagraph. It was felt that the formulation found in that text, no matter which of the two alternatives presented therein in square brackets were retained, was unclear, in addition to being unnecessary.

116. As regards the precise formulation of subparagraph (f), the Working Group agreed to the deletion of the word "independent" in the expression "independent undertaking" in the beginning of the text, as it was felt to be redundant. The Working Group considered, but was not inclined to

accept a suggestion to replace the word "option" by the word "right", a proposal aimed at removing any possible inference that a confirmation might render optional the presentation of documents required to be presented pursuant to the undertaking that was the subject of the confirmation. While there was an inclination for retention of the word "option", the drafting group was asked to look into the matter, including the possibility of alignment of the text with similar formulations used in subparagraph (d) as well as in article 2. The Working Group also referred to the drafting group a suggestion to replace the words "without, however, losing its right to demand payment" by the words "without prejudice to its right to demand payment".

117. Subject to the above changes, the Working Group found the substance of subparagraph (f) to be generally acceptable.

Subparagraph (g) "confirmer"

118. The Working Group found the substance of subparagraph (g) to be generally acceptable.

Subparagraph (h) "document"

119. The Working Group found the substance of subparagraph (h) to be generally acceptable.

Subparagraph (i) ("issuance")

120. The Working Group held a discussion on the meaning and effect of the phrase "leaves the sphere of control of the guarantor/issuer". It was stated at the outset that it was important to be specific as to the meaning of the phrase as, for example, the place of issuance could determine the applicable law. Differing views were expressed as to how to better clarify the point of issuance. One view was that, since the undertaking became irrevocable and fixed at the time it was transmitted to the recipient party, issuance should be related to the time of transmittal. Another view in the same direction was that issuance should be defined by the time of receipt of the instrument so as to take into account instances of theft or loss of the undertaking or other instances when the undertaking might leave the sphere of control of the guarantor/issuer without a positive expression of the wish to be bound by the instrument. Yet another proposal was that, in order to avoid misunderstanding as to issuance, it should be fixed at that time and place that had been agreed to by the parties.

121. Those proposals were objected to on the basis that tying issuance to either transmittal or receipt of the undertaking would subject issuance to even more questions concerning, for example, the point at which an undertaking would be considered to be transmitted or even received. Furthermore, it was pointed out, issuance could not be tied to the agreement of the parties as, in practice, these were not issues that the parties normally jointly stipulated.

122. Interest was expressed in exploring how the phrase "sphere of control of the guarantor/issuer" could be better clarified. It was pointed out that both the time and the place where issuance took place were important as the guarantor/issuer might make arrangements for the undertaking in one place of business but have it issued at another place of business. It was thus stated that what was important was not a place of business but the time and place at which the undertaking was no longer in the control of the guarantor/issuer. Taking this into account, the following formulation was suggested: "Issuance of an undertaking occurs at the time when and the place where that undertaking leaves the sphere of control of the guarantor/issuer." After deliberation, the Working Group agreed to the formulation along those lines and referred it to the drafting group.

123. A view was expressed that the definition of issuance brought out a gap that now existed related to the Working Group's decision on articles 1 and 27 with regard to the relationship between the place of issuance and the place of business of the guarantor/issuer. It was stated that this gap existed because the place of business of the guarantor/issuer need not in all instances be the place of issuance of the undertaking. It was pointed out, however, that this was a matter that was closely related to the decision the Working Group had already taken on articles 1 and 27, and should therefore be discussed in that context.

124. A concern was expressed that reference to "the guarantor/issuer" might lead to some confusion as to which guarantor/issuer was being referred to since the term was used to mean different parties to an undertaking depending on the context. It was stated that, in the context of issuance, it would be useful to clarify that the guarantor/issuer being referred to was the "respective" guarantor/issuer who was in control of the undertaking. A question was raised as to whether this would not mean that, in those instances where issuance by the guarantor, for example, depended on confirmation, the guarantor would be considered to have issued the undertaking once it left the guarantor's sphere of control even if the confirmer had not yet confirmed. It was pointed out, however, that this had more to do with the concept of effectiveness of the undertaking which was dealt with in article 7. After deliberation, the Working Group agreed to add a word such as "respective" before the words "guarantor/issuer" and referred the matter to the drafting group.

125. Subject to the agreed changes, the Working Group found the substance of subparagraph (i) to be generally acceptable.

CHAPTER III. EFFECTIVENESS OF UNDERTAKING

Article 7. (Issuance) (Establishment) of undertaking

Paragraph (1)

126. Differing views were expressed as to which of the two words, "issuance" or "establishment", should be adopted for the title of article 7 and for paragraph (1). A preference was expressed for the use of "issuance" for both the title and paragraph (1) on the basis that, while the term "issuance" had been defined in article 6 (i) and had been used in other provisions of the draft Convention, the term "establishment" had not been defined. It was suggested that "establishment" had the same meaning in the context in which it was used in article 7 (1) as that of "issuance" in article 7 (2) and that the two words could therefore be used interchangeably. A contrary view, widely shared in the Working Group, was that the words had differing meanings as the subject matter of paragraph (1) was different from that of paragraph (2). It was stated that, while paragraph (1) dealt with the form of an undertaking, paragraph (2) dealt with the determination of when an undertaking became effective and whether or not an undertaking could be revoked. According to this view, it was more appropriate to use the word "establishment" in paragraph (1) given the subject matter of that paragraph. With respect to the title it was noted that it had been agreed to use "establishment" at a previous meeting of the Working Group (see A/C.9/391, para. 61). Another proposal made in this regard was to change the title of the article to "form and effectiveness of undertaking", to use the word "issuance" in paragraph (1) and to retain paragraph (2) without any changes. In support of this proposal it was stated that "form and effectiveness of undertaking" was a more appropriate title as it better reflected the subject matter of the article.

127. The Working Group noted that the title of chapter III ("effectiveness of undertaking") was similar to that proposed for the title of article 7 and decided that the title of chapter III should be reassessed at a later point taking into account the content of the other articles in chapter III, which remained to be reviewed. (See also para. 133, concerning a revision of the title, and para. 132, concerning the relocation to article 7 of the provision in article 6(i)). The Working Group agreed to retain the use of the word "issuance" in paragraph (1) as an appropriate word to express the concept involved, but it did not have sufficient time at the present session to consider the content of paragraph (2).

* * *

Consideration of draft articles presented by drafting group

Article 1. Scope of application

128. The Working Group supported the addition of the words "an international" before the words "letter of credit" in paragraph (2); the purpose of the addition was to avoid a situation where a purely domestic letter of credit could become subject to the Convention pursuant to an express opting-in statement referred to in the provision.

Article 2. Undertaking

129. The Working Group accepted a suggestion to replace the word "indicating" in paragraph (1) by the words "indicating, or from which it is to be inferred".

Article 3. Independence of undertaking

130. The Working Group considered that the expression "undertaking" in article 3 covered all types of independent undertakings, including counter-guarantees and confirmations; that meaning obtained from the definition of "undertaking" in article 6(a). Thus, there was agreement in the Working Group that a counter-guarantee as defined in the Convention was independent from both the guarantee covered by the counter-guarantee as well as from the underlying obligation. Nevertheless, in order to make that meaning abundantly clear, the Working Group decided to include, after the words "any other undertaking" words along the lines of "including a guarantee to which the counter-guarantee relates" and appropriate analogous words expressing that principle in regard to confirmations.

131. The Working Group noted that the words "operational purview" might not be clearly understood in different geographic areas and were difficult to translate. As a result, the Working Group considered replacing that expression with an expression along the lines of "the guarantor/issuer's normal sphere of operations". As to the proposed words, it was considered that the word "normal" might give rise to an unintended interpretation that the provision might also encompass operations which, while not customary in the banking practice, were normal for the particular guarantor/issuer. It was stressed that the intention was to refer to operations that were customary, usual or typical in the banking industry. In order to avoid the possibility of such a misunderstanding, the Working Group decided that the appropriate wording was "a guarantor/issuer's sphere of operations".

Article 6. Definitions

132. The Working Group accepted a suggestion to move subparagraph (i) to article 7, since in its modified form it was a rule of an operational character rather than a definition.

Article 7. [Issuance][Establishment] of undertaking

133. The Working Group agreed to amend the title to refer to issuance, form and effectiveness.

Article 17. Payment or rejection of demand

134. It was suggested that in article 17(4) there should be a reference to the provision in article 6(2) concerning the time period left to the guarantor/issuer for examining a demand for payment. Another suggestion was that the non-mandatory nature of article 17(4) should be expressly stated in order to avoid the unintended inference that the provision was mandatory. A further point was whether paragraph (4) should not be incorporated into a separate article. In regard to those suggestions, it was noted that paragraph (4) remained in square brackets pending further consideration by the Working Group and the suggestions could be taken up at a later stage.

Article 19. Improper demand

135. The Working Group noted that article 19(2)(b), (c) and (d) employed the expressions "underlying obligation" and "secured obligation" without there existing any intended difference in meaning and that an alignment of the expressions would be made.

Article 21. Provisional court measures

136. The Working Group noted that the words "funds of the guarantor/issuer or of the beneficiary" had been replaced by the words "the amount of the undertaking held by the guarantor/issuer or the proceeds of the undertaking paid to the beneficiary". Some reservations were expressed as to that change and it was agreed that the change could be reconsidered subsequently.

Articles 26 (Choice of law) and 27 (Determination of applicable law)

137. The Working Group agreed that the expression "rights, obligations and defences relating to an undertaking are", which appeared in articles 26 and 27, should be replaced by "undertaking is"; the purpose of the modification was not to introduce any substantive change, but to facilitate expressing the substance and scope of the provision in the various languages.

FUTURE WORK

138. The Working Group noted that its twenty-third session would be held from 9 to 20 January 1995 in New York. It was noted that, at that session, the Working Group would continue reviewing the articles of the draft Convention, from articles 7(2) to 27. It was further noted that, at that session, the Working Group would have to make a decision regarding chapter VI (jurisdiction), which decision would be made on the basis of an article-by-article review of chapter VI as it appeared in document A/CN.9/WG.II/WP.83.

Notes

1. Official Records of the General Assembly, Forty-third session, Supplement No. 17 (A/43/17), para. 18.

2. Ibid., Forty-fourth session, Supplement No. 17 (A/44/17), para. 244.

3. Ibid., Forty-eighth session, Supplement No. 17 (A/48/17), para. 273.

Annex

Articles of draft Convention on Independent Guarantees and Stand-by Letters of Credit as revised at the twenty-second session

CHAPTER I. SCOPE OF APPLICATION

Article 1. Scope of application

(1) This Convention applies to an international undertaking referred to in article 2:

(a) if the place of business of the guarantor/issuer at which the undertaking is issued is in a Contracting State, or

(b) if the rules of private international law lead to the application of the law of a Contracting State,

unless the undertaking excludes the application of the Convention.

(2) This Convention applies also to an international letter of credit other than a stand-by letter of credit if it expressly states that it is subject to this Convention.

(3) The provisions of articles [24 to 25 bis,] 26 and 27 apply irrespective of whether or not in any given case the Convention applies pursuant to paragraph (1) of this article.

Article 2. Undertaking

(1) For the purposes of this Convention, an undertaking is an independent commitment, usually referred to as an independent guarantee or as a stand-by letter of credit, given by a bank or other institution or person ("guarantor/issuer") to pay to the beneficiary a certain or determinable amount upon simple demand or upon presentation of other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment is due because of a default in the performance of an obligation, or because of another contingency, or for money borrowed or advanced, or on account of any mature indebtedness undertaken by the principal/applicant or another person.

(2) The undertaking may be given:

(a) at the request or on the instruction of the customer ("principal/applicant") of the guarantor/issuer;

(b) on the instruction of another bank, institution or person ("instructing party") that acts at the request of the customer ("principal/applicant") of that instructing party; or

(c) on behalf of the guarantor/issuer itself.

(3) Payment may be stipulated in the undertaking to be made in any form, including:

(a) payment in a specified currency or unit of account;

(b) acceptance of a bill of exchange (draft);

(c) payment on a deferred basis;

(d) supply of a specified item of value.

(4) The undertaking may stipulate that the guarantor/issuer itself is the beneficiary when acting in favour of another person.

Article 3. Independence of undertaking

For the purposes of this Convention, an undertaking is independent where the guarantor/issuer's obligation to the beneficiary is not subject to the existence or validity of an underlying transaction, or to any other undertaking (including guarantees to which counter-guarantees relate, and stand-by letters of credit or independent guarantees to which confirmations or counter-guarantees relate), or to any term or condition not appearing in the undertaking, or to any future, uncertain act or event except presentation of documents or another such act or event within a guarantor/issuer's sphere of operations.

Article 4. Internationality of undertaking

(1) An undertaking is international if the places of business, as specified in the undertaking, of any two of the following persons are in different States: guarantor/issuer, beneficiary, principal/applicant, instructing party, confirmer.

(2) For the purposes of the preceding paragraph:

(a) if the undertaking lists more than one place of business for a given person, the relevant place of business is that which has the closest relationship to the undertaking;

(b) if the undertaking does not specify a place of business for a given person but specifies its habitual residence, that residence is relevant for determining the international character of the undertaking.

CHAPTER II. INTERPRETATION

Article 5. Principles of interpretation

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international independent guarantee and stand-by letter of credit practice.

Article 6. Definitions

For the purposes of this Convention and unless otherwise indicated in a provision of this Convention or required by the context:

(a) "undertaking" includes "counter-guarantee" and "confirmation of an undertaking";

(a bis)"guarantor/issuer" includes "counter-guarantor" and "confirmer";

(b)[deleted]

(c)[deleted]

(d) "counter-guarantee" means an undertaking given to the guarantor/issuer of another undertaking by its instructing party and providing for payment upon simple demand or upon presentation of other documents, in conformity with the terms and any documentary conditions of the undertaking, indicating, or from which it is to be inferred, that payment under that other undertaking has been demanded from, or made by, the person issuing that other undertaking;

(e) "counter-guarantor" means the person issuing a counter-guarantee;

(f) "confirmation" of an undertaking means an undertaking added to that of the guarantor/issuer, and authorized by the guarantor/issuer, providing the beneficiary with the option of demanding payment from the confirmer instead of from the guarantor/issuer, upon simple demand or upon presentation of other documents, in conformity with the terms and any documentary conditions of the confirmed undertaking, without prejudice to the beneficiary's right to demand payment from the guarantor/issuer;

(g) "confirmer" means the person confirming an undertaking;

(h) "document" means a communication made in a form that provides a complete record thereof;

(i) [moved to article 7]

(j) [deleted]

[CHAPTER III. EFFECTIVENESS OF UNDERTAKING]

Article 7. Issuance, form and effectiveness of undertaking

(new 1) Issuance of an undertaking occurs when and where the undertaking leaves the sphere of control of the guarantor/issuer concerned.

(1) An undertaking may be issued in any form which preserves a complete record of the text of the undertaking and provides authentication of its source by generally accepted means or by a procedure agreed upon by the guarantor/issuer and the beneficiary.

CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES

Article 17. Payment or rejection of demand

(1) Subject to paragraph (2) of this article, the guarantor/issuer shall pay against a demand made in accordance with the provisions of article 14. Following a determination that a demand for payment so conforms, payment shall be made promptly, unless the undertaking stipulates payment on a deferred basis, in which case payment shall be made at the stipulated time.

(1 bis)Any payment against a demand that is not in accordance with the provisions of article 14 does not prejudice the rights of the principal/applicant.

(2) Where the guarantor/issuer is shown facts that make the demand manifestly and clearly improper according to article 19 and, for that reason, payment would not be in good faith, it shall not make payment.

(3) If the guarantor/issuer rejects the demand, it shall promptly give notice thereof to the beneficiary by teletransmission or, if that is not possible, by other expeditious means. Unless otherwise stipulated in the undertaking, the notice shall indicate the reason for the rejection.

[(4) The guarantor/issuer may not, as grounds for rejection of the demand, invoke any discrepancy in the documents not notified to the beneficiary as required by paragraph (3) of this article.]

Article 19. Improper demand

(1) A demand for payment is improper if:

(a) any document is not genuine or has been falsified;

(b) no payment is due on the basis asserted in the demand and the supporting documents; or

(c) judging by the type and purpose of the undertaking, the demand has no conceivable basis.

(2) For the purposes of paragraph (1) (c) of this article, the following are types of situations in which a demand has no conceivable basis:

(a) the contingency or risk against which the undertaking was designed to secure the beneficiary has undoubtedly not materialized;

(b) the underlying obligation of the principal/applicant has been declared invalid by a court or arbitral tribunal, unless the undertaking indicates that such contingency falls within the risk to be covered by the undertaking;

(c) the underlying obligation has undoubtedly been fulfilled to the satisfaction of the beneficiary;

(d) fulfillment of the underlying obligation has clearly been prevented by wilful misconduct of the beneficiary.

Article 20. Set-off

Unless otherwise stipulated in the undertaking or elsewhere agreed by the guarantor/issuer and the beneficiary, the guarantor/issuer may discharge the payment obligation under the undertaking by availing itself of a right of set-off, except with any claim assigned to it by the principal/applicant.

CHAPTER V. PROVISIONAL COURT MEASURES

Article 21. Provisional court measures

(1) Where, on an application by the principal/applicant or the instructing party, it is shown that there is a high probability that a demand made, or expected to be made, by the beneficiary is improper, the court, on the basis of immediately available strong evidence, may issue a provisional order to the effect that the beneficiary does not receive payment or that the amount of the undertaking held by the guarantor/issuer or the proceeds of the undertaking paid to the beneficiary are blocked, taking into account whether in the absence of such an order the principal/applicant would be likely to suffer serious harm.

(2) [deleted]

(3) The court, when issuing a provisional order referred to in paragraph (1) of this article, may require the person applying therefor to furnish such form of security as the court deems appropriate.

(4) The court may not issue a provisional order of the kind referred to in paragraph (1) of this article based on any objection to payment other than improper demand or use of the undertaking for an illegal purpose.

CHAPTER VII. CONFLICT OF LAWS

Article 26. Choice of applicable law

The undertaking is governed by the law designated by the guarantor/issuer and the beneficiary. Such designation may be stipulated in the undertaking or agreed elsewhere, or it may be demonstrated by the terms and conditions of the undertaking.

Article 27. Determination of applicable law

Failing a choice of law in accordance with article 26, the undertaking is governed by the law of the State where the guarantor/issuer has that place of business at which the undertaking was issued.

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